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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	CC Docket No. 96-128

REQUEST FOR STAY OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

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Dated: December 1, 1997

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SUMMARY

The Personal Communications Industry Association ("PCIA") requests that the Commission stay its *Payphone Remand Order* until two conditions are met: (1) local exchange carriers ("LECs") provide unique payphone coding digits for transmission by payphone service providers ("PSPs") to enable call blocking, and (2) interexchange carriers demonstrate that they can offer call blocking to end users at a reasonable price for substantially all subscriber 800 and access code calls originated from payphones. At a minimum, the Commission should stay its Payphone Remand Order until March 9, 1998, the date on which the waiver of LEC obligations to provide PSPs with coding digits expires.

All four factors of the test employed by the Commission to determine whether to grant a stay favor PCIA's request. First, PCIA is likely to prevail on the merits of its Petition for Review, filed with the Court of Appeals concurrently with this Request for Stay, arguing that the enforcement of carriers' compensation obligations (1) while waiving LEC coding digit obligations and (2) without considering the costs of call blocking guts the basis for the Commission's market-based compensation system. Second, a stay is necessary to avoid irreparable financial and competitive harm to paging carriers. Third, other interested parties will not be harmed if the Commission grants a stay. Fourth, the public interest in innovative, affordable, and widely available services favors granting a stay.

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REQUEST FOR STAY OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

Pursuant to Section 416(b) of the Communications Act of 1934 and Section 1.43 of the Commission's Rules, the Personal Communications Industry Association ("PCIA")[1] respectfully requests that the Commission immediately stay its *Payphone Remand Order*[2] until call blocking is feasible for interexchange carriers ("IXCs") and widely available to end users at a reasonable

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[1] PCIA is the international trade association that represents the interests of both commercial and private mobile radio service providers. PCIA's federation of Councils includes the Paging and Narrowband PCS Alliance; the Broadband PCS Alliance; the Mobile Wireless Communications Alliance; the Site Owners and Managers Association; the Association of Communications Technicians; and the Private System Users Alliance. PCIA represents both traditional paging service providers and narrowband PCS licensees. As used in this Petition, the term "paging" is intended to embrace narrowband PCS as well.

[2] *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Second Report and Order*, FCC 97-371 (rel. Oct. 9, 1997) ("*Payphone Remand Order*").

price.[3] Specifically, the Commission should stay its *Payphone Remand Order* until two conditions are met: (1) local exchange carriers ("LECs") provide unique payphone coding digits for transmission by payphone service providers ("PSPs") to enable call blocking, and (2) IXCs demonstrate that they can offer call blocking to end users at a reasonable price for substantially all subscriber 800 and access code calls originated from payphones.

At the very least, the Commission should stay its *Payphone Remand Order* until March 9, 1998, at which time the waiver of LEC obligations to provide PSPs with coding digits expires.[4] In staying these compensation obligations, the Commission should also bar IXCs from passing on to end users any charges or rate increases that anticipate compensation obligations until they are, in fact, effective.

The Commission generally employs a four-factor test in determining whether to grant a request for stay. This test requires the petitioner to show: (1) that it is likely to prevail on the merits of its appeal; (2) that it will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors

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[3] Section 1.45(d) of the Commission's rules provides that parties have seven days to comment on PCIA's stay request. *See* 47 C.F.R. § 1.45(d). If the Commission fails to take action on this stay request by December 10, 1997, PCIA will deem Commission inaction a denial of its stay request and will seek a stay from the Court of Appeals. PCIA has already sought judicial review of the *Payphone Remand Order*, having filed a Petition for Review with the United States Court of Appeals for the District of Columbia Circuit on December 1, 1997.

[4] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order*, DA 97-2162 (Com. Car. Bur. Oct. 7, 1997), at ¶ 8 ("*Coding Digit Waiver Order*").

the grant of a stay.[5] These factors must be weighed and balanced in determining whether a stay is appropriate, and the strength of some factors may offset weakness in another. Thus, a stay may be granted with either a high probability of success on the merits and some injury, or *vice versa*.[6] In addition, the necessary likelihood of success will vary according to the assessment of the other factors, and where the last three factors strongly favor granting the stay, the petitioner need only make a substantial case on the merits.[7]

All four factors favor a grant of PCIA's stay request:

- PCIA is likely to prevail on the merits of its Petition for Review, filed with the Court of Appeals concurrently with this Request for Stay, arguing that the enforcement of carriers' compensation obligations (1) while waiving LEC obligations to provide coding digits until March 9, 1998, and (2) without ever considering the cost of implementing blocking technologies is blatantly inconsistent with the Commission's rationale for choosing market-based payphone compensation;

- The paging industry, including PCIA's members, will suffer irreparable economic and competitive harm if a stay is not granted;

- Other interested parties will not be harmed if a stay is granted; and

- The public interest in innovative, affordable, and widely available services favors grant of a stay.

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[5] *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 4 FCC Rcd. 6476, 6476-77 (1989) ("*Syndex Order*"). *See also Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (articulating same test for judicial stay).

[6] *Cuomo v. United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985).

[7] *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Syndex Order*, 4 FCC Rcd. at 6477.

Because each of these factors weights strongly in PCIA's favor, the Commission should stay its *Payphone Remand Order* until call blocking becomes viable.

I. PCIA IS LIKELY TO PREVAIL ON APPEAL BECAUSE THE COMMISSION'S ACTIONS ON CALL BLOCKING GUT ITS MARKET-BASED COMPENSATION STANDARD

The first factor of the four-part test for a stay—likelihood of prevailing on the merits—weighs strongly in PCIA's favor. The Commission's actions with respect to call blocking are contradictory, inconsistent, and undermine the market-based compensation standard the Commission purported to adopt. PCIA is therefore likely to prevail on the merits in its Petition for Review in arguing that the Commission's actions are arbitrary and capricious, and not based on record evidence.

A. Waiver of the LECs' Coding Digit Obligations Precludes Call Blocking, Undermining the Basis for the Commission's Compensation System

The Commission's imposition of compensation obligations without call blocking is arbitrary and capricious. By enforcing carriers' compensation obligations while waiving the coding digit requirements of the *Payphone Orders*,[8] the Commission has deprived end users and IXCs of competitive leverage to negotiate alternative compensation rates, gutting the basic rationale for its market-based compensation standard. The Commission continues to rely on the viability of call blocking as the basis for its market-based approach to payphone compensation

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[8] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order*, 11 FCC Rcd. 20541 (1996) ("*Payphone Report & Order*"); *Order on Reconsideration*, 11 FCC Rcd. 21233 (1996) ("*Payphone Recon. Order*") (collectively, "*Payphone Orders*").

while at the same time effectively precluding IXCs from offering call blocking by denying them the technical information necessary for implementation.

In upholding the Commission's market-based compensation standard as adopted in the *Payphone Orders*, the D.C. Circuit affirmed the Commission's findings that "carriers have some leverage 'to negotiate for lower per-call compensation amounts' in that they can block calls from particular payphones charging excessive rates."[9] The Commission reiterated this position in its *Payphone Remand Order*. In rejecting the argument that a market-based compensation standard would overcompensate PSPs, the Commission found that "[c]arriers have significant leverage within the marketplace to negotiate for lower-per-call compensation amounts, regardless of the local coin rate at particular D.C., and ***to block subscriber 800 calls from payphones when the associated compensation amounts are not agreeable to the carrier***."[10] The Commission's findings, however, are blatantly inconsistent with the Common Carrier Bureau's actions with respect to coding digits, which have eliminated any such leverage.

The Bureau has granted a five-month waiver, until March 9, 1998, of the requirement that LECs provide unique payphone coding digits for transmission by PSPs, so that IXCs and their customers may choose to block payphone-originated calls should they so choose.[11] The Commission was well aware of the coding digit waiver, having expressly noted it with approval in

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[9] *Illinois Public Telecommunications Ass'n v. FCC*, 117 F.3d 555, 567 ("*IPTA*"), *clarified on reh'g*, 123 F.3d 693 (D.C. Cir. 1997).

[10] *Payphone Remand Order* ¶ 97 (emphasis added).

[11] *Coding Digit Waiver Order* ¶¶ 8, 9.

the *Payphone Remand Order*.[12] Nevertheless, the Commission advanced and relied upon a competitive safeguard—call blocking—which cannot yet exist.

The Commission's actions are blatantly inconsistent with the conclusions of the D.C. Circuit in *IPTA*. The D.C. Circuit found that the Commission's choice of a market-based system of compensation was premised on the ability of carriers to block calls from PSPs making excessive compensation demands.[13] Notwithstanding the court's conclusions, however, the Commission has implemented a scheme in which carriers cannot yet block calls. The Commission's contradictory actions leave it with no legal basis for its market-based compensation scheme. To rationalize the actions taken so far, the Commission, at a minimum, should stay the compensation obligations of the *Payphone Remand Order* in the manner described above.

B. The Commission's Failure to Consider the Costs of Call Blocking Undermines Its Payphone Compensation Scheme

The Commission's conclusions regarding call blocking were not based on record evidence. The Commission's failure to consider the costs of blocking and the likely pass-through of blocking charges to end users undermines its payphone compensation scheme, which depends on call blocking to counter unreasonable compensation charges. The Commission declined to address these issues in the *Payphone Remand Order* on the grounds that its Public Notice did not invite comments on these issues. "[These] issues were raised by parties in response to the Notice, despite its limited scope. In this order, we do not revisit the issue of who is responsible for paying

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[12] *Payphone Remand Order* ¶ 5.

[13] *IPTA*, 117 F.3d at 564, 566.

compensation and whether carriers can block, issues already addressed in the *Payphone Orders*, and upheld by the Court."[14]

As the D.C. Circuit recognized, however, call blocking will likely be expensive to implement.[15] Nowhere has the Commission discussed how much blocking might cost, or whether or not end users might be able to afford call blocking charges imposed by IXCs. The Commission's much-vaunted "competitive leverage" argument therefore lacks a critical factual underpinning, namely the economic viability of blocking. The Commission has examined the availability of call blocking only in terms of technological feasibility. Call blocking, however, will not be deployed and used unless it is affordable.

At present, even assuming its availability, call blocking does not look attractive to end users. What little factual information is available indicates that it will impose enormous costs on IXCs, who in turn will have an incentive to pass those costs on to end users. Before embarking on a market-based compensation system that presupposes call blocking, the Commission should determine whether or not it can be deployed at a reasonable price so as to make it an economically viable option for end users.

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14 *Payphone Remand Order* ¶ 132.

15 *IPTA*, 117 F.3d at 564 (noting that call blocking is "hardly an ideal option" and "expensive to implement").

II. A STAY IS NECESSARY TO AVOID IRREPARABLE HARM TO THE PAGING INDUSTRY

The second factor of the four-part test for a stay—irreparable harm—strongly weighs in PCIA's favor. The Commission's actions will cause both irreparable financial and competitive harm to PCIA's member paging carriers.

While economic harm does not always constitute irreparable harm sufficient to warrant equitable relief, courts have found that when there is no possibility that adequate compensatory or other corrective relief will be available at a later date, such as in the ordinary course of litigation, the harm will be irreparable.[16] "The very thing which makes an injury 'irreparable' is the fact that no remedy exists to repair it."[17]

In its decision to grant the coding digit waiver, the Common Carrier Bureau determined that the cost to IXCs and end users of incurring compensation obligations without being able to block calls was outweighed by other considerations.[18] The Commission effectively endorsed the Bureau's reasoning, noting that it would impose per-call compensation obligations even though the coding digit requirement that enables call blocking had been waived.[19]

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16 *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

17 *Bannercraft Clothing Co. v. Renegotiation Bd.*, 466 F.2d 345, 356 n.9 (D.C. Cir. 1972), *rev'd on other grounds*, 415 U.S. 1 (1974), *vacated*, 466 F.2d 345 and 495 F.2d 1074 (D.C. Cir. 1974).

18 *Coding Digit Waiver Order* ¶ 13.

19 *Payphone Remand Order* ¶ 5.

During the waiver period, however, paging carriers will be subject to unavoidable and potentially unlimited compensation obligations which they cannot recoup through reimbursement or litigation. Paging carriers are presently faced with the choice of either trying to absorb the cost of potentially ruinous compensation obligations or discontinuing a key component of their service to paging customers—the ability to call a paging carrier's 800 number to collect messages. If paging carriers limit their exposure to these charges by discontinuing subscriber 800 services or trying to pass along these costs, they will inevitably lose a substantial portion of their customer base. These financial threats to paging carriers could simply put paging carriers out of business before call blocking ever became viable. Moreover, it also remains to be seen whether or not call blocking will be affordable. Exorbitant activation and recurring charges for call blocking also threaten the long-term financial well-being of paging companies.

Without the ability to refuse calls, paging carriers will also lack the competitive leverage—much touted by the Commission—as a means for negotiating alternative compensation arrangements. Without a stay, the Commission will place end users such as paging carriers at a competitive disadvantage throughout the interim compensation period—which extends through October 6, 1999—and perhaps beyond. Yet even this competitive disadvantage pales in comparison to the immediate effect of overwhelming compensation obligations and exorbitant call blocking costs.

III. OTHER INTERESTED PARTIES WILL NOT BE HARMED IF THE COMMISSION GRANTS A STAY

The third factor of the four-part test for a stay—no harm to other interested parties—strongly weighs in PCIA's favor. A delay in compensation to PSPs pending the implementation of call blocking is the only possible harm which another interested party could allege.[20] This alleged harm would be minimal at best. Regardless of the merits, the Commission has already indicated that it will provide compensation to PSPs for the interim period, *i.e.*, for the period ending October 7, 1997.[21] In fact, the Commission intends to conduct a separate proceeding on the issue of interim compensation.[22] That proceeding could just as well address the issue of compensation during a stay. For end users such as paging companies, however, there is no remedy for recovering lost customers, excessive compensation payments, and reimbursement for revenue due to reduced provision of subscriber 800 or paging services.

IV. THE PUBLIC INTEREST FAVORS GRANT OF A STAY

The public interest favors granting a stay for three principal reasons. *First*, without a stay, end users such as paging companies will be faced with the possibility of exorbitant compensation obligations because they will not be able to refuse calls by requesting that IXCs block them. With a stay in place, however, end users would not be subject to compensation obligations until they had an option of refusing calls, thereby giving end users a choice of whether or not to incur compensation obligations.

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[20] IXCs would not be harmed by the stay as they are not entitled to collect compensation obligations before they actually become due. PCIA requests that the Commission stay the collection of compensation by IXCs until call blocking is implemented in order to prevent a windfall to the IXCs.

[21] *Payphone Remand Order* ¶ 4.

[22] Public Notice, Pleading Cycle Established for Comment on Remand Issues in the Payphone Proceeding, DA 97-1673, at 5 (rel. Aug. 5, 1997).

Second, without a stay, end users such as paging carriers may be forced to curtail their use of 800 services in order to ward off the threat of outrageous and virtually unlimited compensation obligations. The lack of call blocking would therefore discourage the provision and use of both subscriber 800 services and paging services—a result that is clearly at odds with the stated objectives of the Communications Act of 1934, namely to "make available, so far as possible, . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[23] A stay will ensure that paging carriers continue to offer a broad range of services, including subscriber 800 services, to their customers.

Third, as demonstrated in part I above, the Commission will undermine its own objective of market-based payphone compensation without a stay. By granting a stay, the Commission will avoid causing further competitive harm by disadvantaging end users in the provision of payphone services and further a scheme that it has repeatedly found to be in the public interest.[24]

While PCIA and its members endorse the concept of call blocking to the extent it serves as a competitive counterbalance to exorbitant compensation obligations, they remain unconvinced that viable call blocking, alone, will facilitate lower per-call compensation arrangements. Call blocking is at best a safety mechanism to prevent IXCs and end users (to whom IXCs will pass blocking charges at a profit) from being overwhelmed with unwanted compensation obligations. Its use will only *discourage* the use of payphones and associated services, such as 800 services

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[23] Section 1 of the Communications Act of 1934, codified as amended, 47 U.S.C. § 151.

[24] *Payphone Remand Order* ¶ 24; *Payphone Recon. Order*, 11 FCC Rcd. at 21258-59; *Payphone Report & Order*, 11 FCC Rcd. at 20567.

offered by paging companies, because it prevents attempted calls from being completed. Moreover, as numerous parties have demonstrated in this proceeding, call blocking is expensive, further deterring the proliferation of payphone services.

CONCLUSION

For the reasons set forth above, the Commission should stay its *Payphone Remand Order*.

Respectfully submitted,

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Dated: December 1, 1997

CERTIFICATE OF SERVICE

I, Evan R. Grayer, do hereby certify that a copy of the foregoing Request for Stay of the Personal Communications Industry Association has been sent by first-class mail, postage prepaid, on this 1st day of December, 1997 to the following:

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